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No. 96-1060

In the Supreme Court of the United States

OCTOBER TERM, 1996

LORELYN PENERO MILLER, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the distinction in Section 309 of the Immigration and Nationality Act, 8 U.S.C. 1409, between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers violates the Fifth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 96 F.3d 1467. The opinion of the district court (Pet. App. 26-31) is unreported, as is the earlier order of the district court for the Eastern District of Texas (App., *infra*, 9a-12a).

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1996. The petition for a writ of certiorari was filed on January 6, 1997, and granted on April 28, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. Petitioner was born in the Philippines on June 20, 1970. Local birth records identify petitioner's mother as Luz Penero, a Philippine national; they do not identify a father. Petitioner alleges that her biological father is Charlie Miller, a United States citizen, who at the time of conception was a 23-year-old member of the United States military on duty in the Philippines. Mr. Miller never married Ms. Penero. Pet. App. 2, 26-27, 32-33; J.A. 21.

In February 1992, several months after her 21st birthday, petitioner applied to the Department of State for registration as a United States citizen. Pet. App. 2, 27; J.A. 15-24. Without resolving the issue of biological paternity, the Department denied petitioner's application on the ground that she had not established any formal legal and financial relationship with her putative father either "while [petitioner was] under the age of twenty-one years by legitimation," as required by former Section 309(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1409(a) (1982), or before she turned 18 under the legitimation-or-acknowledgment provisions of present Section 309(a). Pet. App. 3-4, 28-29.

In July 1992, Charlie Miller obtained a voluntary paternity decree in state court, establishing as a matter of Texas law that he is petitioner's "biological and legal father" and declaring that "[t]he parent-child relationship is created between the father and the child as if the child were born to the father and the mother during marriage." Pet. App. 37-38. Petitioner submitted that decree to the State Department and requested reconsideration of her application for registration as a citizen. After reviewing the matter, however, the Department adhered to its original determination. *Id.* at 32-35.

2. Petitioner filed this action in the United States District Court for the Eastern District of Texas, alleging,

among other things, that the INA's different treatment of legitimate and illegitimate children violated principles of equal protection. 1/21/93 Compl. 3. The government moved to dismiss the complaint, pointing out, among other things, that there was no basis for venue in the Eastern District of Texas. See Pet. App. 27. Petitioner then amended her complaint to add Charlie Miller as a plaintiff, and also added a new claim that the INA's different treatment of citizen mothers and citizen fathers prohibited Mr. Miller from "pass[ing] on his citizenship to his daughter even though a female in his position could," and "violate[d] his right to equal protection under the laws by utilizing the suspect classification of gender without justification." J.A. 6, 9-11. The amended complaint sought a declaration that petitioner is a citizen of the United States. J.A. 11-12.

The government renewed its motion to dismiss on various grounds. 4/14/93 Mot. To Dismiss 2-6. The district court held that Mr. Miller lacked "standing" because this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), had previously "reviewed the reasons underlying the distinction between mothers and fathers of children born out of wedlock, and determined that the distinction did not violate the equal protection clause of the United States Constitution." App., *infra*, 10a. The court therefore dismissed Mr. Miller as a plaintiff. *Id.* at 11a-12a. There being no remaining basis for venue in Texas, the court transferred the case to the District of Columbia, where venue was proper under 28 U.S.C. 1391(e)(1). App., *infra*, 11a-12a.

The government again moved to dismiss. 8/9/93 Mot. to Dismiss. The district court agreed with the government that under *INS* v. *Pangilinan*, 486 U.S. 875, 884 (1988), "courts do not have the power to confer citizenship in the absence of statutory authority," and that it therefore lacked any ability to redress the injury alleged by peti-

tioner. Pet. App. 31. The court accordingly granted the government's motion and dismissed the case. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-25. With respect to standing, the court reasoned that the proper inquiry is "whether a plaintiff's injury would be likely to be redressed *if the requested relief were granted.*" *Id.* at 6-7 (quoting *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989)). Here, the court concluded (Pet. App. 7) that if the district court had held that Section 309(a)'s specific requirements for conferring citizenship on an illegitimate child of a citizen father were unconstitutional, *Pangilinan* would not have barred it from further declaring, as petitioner requested, that illegitimate children should be treated the same as legitimate children under Section 301 of the INA, 8 U.S.C. 1401, and then entering a "finding" that petitioner satisfied the requirements for citizenship set out in Section 301(g) (reprinted at App., *infra*, 3a). In the court's view, "[s]uch a finding would not have violated *Pangilinan*'s proscription on the exercise of judicial equitable power to confer U.S. citizenship in the absence of legislative authority." Pet. App. 7.

On the merits, however, the court of appeals sustained the constitutionality of Section 309(a). At the outset, the court noted that, although petitioner "claim[ed] that the statute denies equal protection by illegally distinguishing between * * * the rights of the father of an illegitimate child versus those of its mother," that claim was "based upon Mr. Miller's rights as a parent." Pet. App. 8. Because petitioner's father was not a party to the appeal, the court held that that claim was "not properly before the court." *Ibid.*

The court accordingly limited its consideration to petitioner's claims that Section 309(a) "denies equal protection by illegally distinguishing between: (a) legitimate versus illegitimate children, [and] (b) the illegitimate children of men versus those of women." Pet. App. 8; see also *id.* at 10. In addressing those claims, the court first recognized this Court's holdings that any exercise of Congress's "plenary authority to prescribe rules for the admission and exclusion of aliens" must be upheld if a court can discern any "facially legitimate and bona fide reason" to support it. *Id.* at 8-9. The court then reviewed (*id.* at 10-12) this Court's decision in *Fiallo* v. *Bell*, which upheld a provision that, like Section 309(a), required illegitimate foreign-born children claiming immigration benefits through a citizen father to provide different evidence than that required of such children claiming benefits through a citizen mother.

The court of appeals explained that *Fiallo* had mentioned two possible legitimate reasons for the statutory distinctions at issue in that case: "a perceived absence in most cases of close family ties," and "a concern with the serious problems of proof that usually lurk in paternity determinations." Pet. App. 12, quoting *Fiallo*, 430 U.S. at 799 (alteration omitted). The court remarked that "recent developments in DNA technology may have removed many of the difficulties that once plagued the proof of paternity," but it found a congressional "desire to promote early ties to this country and to those relatives who are citizens of this country" to be a rational basis for the financial support and legitimation-or-acknowledgment requirements of Sections 309(a)(3) and (4). Pet. App. 12-13. Moreover, the court found it "entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father," because "[a] mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence." *Id.* at 13. Indeed, the court found the requirement for such evidence "especially warranted where, as here, the applicant for citizenship was fathered by a U.S. ser-

viceman while serving a tour of duty overseas," and where she and her father "had not had an ongoing parental relationship while she was a minor." *Ibid.* Accordingly, the court saw "no basis for concluding that section [309(a)] is unconstitutional." *Ibid.*[1]

Judge Wald concurred in the judgment. Pet. App. 15-25. Although she agreed that this Court's decision in *Fiallo* was "directly on point" (*id.* at 25), Judge Wald criticized both the "facially legitimate and bona fide" standard for reviewing immigration legislation (*id.* at 17 n.2) and the use of what she regarded as outmoded or stereotype-based justifications to uphold Section 309(a). In her view, the advent of genetic testing had removed any rational or even "facially legitimate" basis for requiring citizen fathers (but not mothers) to acknowledge and agree to support such a child before adulthood as a means of preventing fraud (*id.* at 15-16, 18-20), and the use of such measures to ensure early ties to the United States rested on an impermissibly "stereotyping assumption that mothers automatically will be close to their illegitimate children whereas fathers will not" (*id.* at 20-24). Judge Wald concluded that *Fiallo*, although controlling, was "out of step with th[is] Court's current refusal to sanction 'official action that closes a door or denies opportunity to women (or to men)' based on stereotypes or 'overbroad generalizations,'" and that it "should be changed by Congress or the Supreme Court." *Id.* at 25.

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[1] The court of appeals rejected (Pet. App. 14) petitioner's argument that, because the state paternity decree obtained by her father when she was 22 years old established a parent-child relationship, for state-law purposes, retroactively to the date of her birth, she had established paternity by adjudication "while [she was] under the age of 18 years" within the meaning of Section 309(a)(4). This Court declined to review that ruling. Compare Pet. i (Question 5) with 117 S. Ct. 1689 (1997) (limiting question presented).

SUMMARY OF ARGUMENT

Section 309(a) of the Immigration and Nationality Act (INA) permits a child born abroad out of wedlock to claim United States citizenship on the basis of the child's relation to a United States citizen father, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to support the child financially until the age of 18, and (iii) before the child turns 18, he or she is legitimated under the laws of his or her residence or domicile, paternity is established by adjudication, or the father acknowledges paternity in writing under oath. Section 309(c) permits such a child to claim citizenship on the basis of relation to a citizen mother, so long as the mother was physically present in the United States, before the child's birth, for a continuous period of at least one year. Petitioner, who was born abroad out of wedlock to an alien mother, claims that she is entitled to citizenship because her father is a citizen. The State Department denied petitioner's claim on the ground that she was not legitimated or acknowledged by her putative father, or adjudicated to be his child, before she reached the age of 18.

1. Much of the argument presented by petitioner and her amici centers on an asserted constitutional right of citizen fathers to be treated identically to citizen mothers with regard to the transmission of citizenship to children born abroad. No such right is at issue in this case. Petitioner's putative father is not a party, and the only rights petitioner may assert are her own. Yet an alien outside the United States seeking naturalization has no substantive rights cognizable under the Fifth Amendment. Petitioner's claim should be rejected on that ground alone. Even if we assume, however, that some constitutional claim is properly presented, the distinctions drawn in Section 309 are fully consistent with the Constitution.

2. The principal rule of United States citizenship, now embodied in the Fourteenth Amendment, is that any child born in this country becomes a citizen at birth. Any child born abroad, on the other hand, becomes a citizen only if Congress has made some specific provision to that effect, and then only upon strict compliance with any conditions imposed by statute. Since 1790, congressional policy in this area has reflected a concern that a foreign-born child whose personal circumstances indicate no tie to the United States beyond a mere blood relationship should not automatically become a citizen of this country. That policy was strongly reiterated in the extensive consideration and enactment of the Nationality Act of 1940, which also first explicitly addressed the issue of children born abroad out of wedlock. Section 205 of that Act is the direct precursor of Section 309 of the INA.

3. This Court has always accorded extraordinary deference to Congress's legislative choices in the field of immigration and nationality. That approach to judicial review rests on the text of the Constitution and on sound considerations of national sovereignty, foreign relations, and the fundamentally political character of immigration and nationality decisions.

The distinctions drawn in Section 309 are tied to important congressional concerns. The acknowledgment and support requirements of Section 309(a) help to ensure that an illegitimate child claiming through a citizen father will have some nexus to this country that goes beyond mere biological descent, and that the child is actually comparably situated to one who claims through a citizen mother. The requirement that both conditions be fulfilled before the child reaches adulthood helps ensure that the child will not become a public charge, and provides some assurance that the father's commitments will be real and that the child's ties to the United States will develop at

the time when they are most likely to distinguish the child of a citizen from any other individual born abroad. The requirement that an illegitimate child provide clear and convincing evidence of paternity, which is not subject to any time limitation, accommodates valid concerns regarding proof of paternity. Finally, the more lenient parental residency requirement that applies to illegitimate children claiming through citizen mothers reflects not only a reasonable assumption about the likelihood of maternal custody in such cases, but a concern with reducing the risk of statelessness, which is greater in such cases than in those involving only an American father.

As the court of appeals recognized, this Court's decision in *Fiallo* v. *Bell* compels the conclusion that these distinctions are constitutional. *Fiallo* accepted as valid, in the immigration and nationality context, the considerations that paternity is more likely to be in doubt than maternity and that an illegitimate foreign-born child is more likely to have close ties to a citizen mother than to a citizen father. If anything, the few differences between this case and *Fiallo* demonstrate that the distinctions at issue here are even more clearly permissible than those at issue in that case. The arguments that petitioner and her amici advance for distinguishing or overruling *Fiallo* are unpersuasive.

4. Even if the distinctions drawn in Section 309 were unconstitutional, the appropriate remedy would not be a judicial declaration that petitioner is a citizen. The distinction challenged here is not between legitimate children, whose claims are governed by Section 301(g) of the INA, and the illegitimate children whose claims are governed by Section 309, but rather between those illegitimate children claiming under Section 309 through a citizen father and those claiming through a citizen mother. If the Court were to hold the distinctions drawn by Section

309 to be unconstitutional, any remedial measure would have to focus on that Section. If Section 309 were eliminated, Section 301(g), which was never intended to apply of its own force to illegitimate children, could not properly be expanded to authorize citizenship for petitioner. If a court sought to eliminate any inequality within the existing framework of Section 309, the exceptionally important, complicated, and permanent consequences involved would argue strongly against any judicial expansion of a provision conferring citizenship, and would suggest that the court should, instead, favor limitation or nullification of existing statutory authority in order to remedy any perceived violation of equal protection.

ARGUMENT

I. THIS CASE INVOLVES ONLY THE RIGHTS OF AN ALIEN ABROAD WHO SEEKS NATURALIZATION AS A CITIZEN OF THE UNITED STATES

This case involves a claim to United States citizenship by a young woman who was born abroad out of wedlock to an alien mother and, so far as appears, a U.S. serviceman father. Although petitioner had no parental relationship with her putative father while she was a minor (Pet. App. 13), at the age of 21 she sought recognition as an American citizen on the basis of her alleged biological descent from a citizen father. Her request was denied on the ground that she had not satisfied the requirements established by Congress in Section 309(a) of the Immigration and Nationality Act (INA) for the conferral of citizenship at birth on children born abroad out of wedlock to U.S. citizen fathers and alien mothers. In granting review, this Court limited the question presented to whether the distinction drawn in Section 309 between the illegitimate foreign-born children of citizen fathers and those of citizen mothers violates the Fifth Amendment to the United States Constitution.

Much of the argument presented by petitioner and her amici, like much of the discussion in the concurring opinion below, seems to assume that this case centers on an asserted constitutional right of citizen fathers to be treated identically to citizen mothers. We therefore think it important to note, at the outset, that that assumption is incorrect. As the court of appeals properly recognized (Pet. App. 8), petitioner's citizen father was dismissed from this case at the outset, never appealed from that decision, and is not a party to this proceeding. See also J.A. 10-11 (raising gender discrimination claim only on behalf of petitioner's father). Thus, no citizen parent's rights are properly at issue in this case. *Ibid.*[2] The only rights petitioner may assert are those of an alien outside the United States who is seeking naturalization as a citizen of this country. Yet such an alien has no substantive rights cog-

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[2] Petitioner's father was available to assert his own rights in this case, and he could have remained a party by appealing from the order dismissing him as a plaintiff. There is therefore no basis for according petitioner third-party standing to assert any rights her father might have as a citizen. See Pet. App. 8; *Ablang* v. *Reno*, 52 F.3d 801, 804 n.4 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996); see also, *e.g.*, *Powers* v. *Ohio*, 499 U.S. 400, 410-411 (1991); *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); compare *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987) (children permitted to assert constitutional right of deceased parent with respect to descent of property); *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1410-1411 (9th Cir. 1993) (children permitted to assert right to transmit citizenship where citizen mothers were "deceased and [could] no longer press an equal protection claim on their own behalf"). Moreover, although the district court phrased its dismissal of Mr. Miller's suit in terms of standing, it essentially rejected his claim on the merits, applying *Fiallo* v. *Bell*. App., *infra*, 10a-11a. Petitioner would be bound by that ruling even if she had third-party standing to assert her father's rights.

nizable under the Fifth Amendment. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269-271 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770-771, 781-785 (1950); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."); *Cuban American Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428-1429 (11th Cir.), cert. denied, 115 S. Ct. 2578, 116 S. Ct. 299 (1995). Petitioner's constitutional claim should be rejected, and the judgment of the court of appeals affirmed, on that ground alone.

Even if we assume, however, that petitioner may assert some constitutional claim, the only statutory distinction properly at issue in this Court is that between foreign-born illegitimate children who claim derivative citizenship through citizen mothers and those who claim it through citizen fathers. That distinction involves the type of showing that such children must make concerning the existence of some substantial relationship with the citizen parent through whom they claim.

II. SECTION 309 EMBODIES REASONABLE RULES ADOPTED BY CONGRESS SPECIFICALLY TO ADDRESS THE UNIQUE SITUATION OF ILLEGITIMATE CHILDREN BORN ABROAD

A. The Constitution Commits To Congress The Power To Specify Rules For The Naturalization Of Children Born Abroad

As this Court has long recognized, the Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Under the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization."

Ibid. That principle has deep roots in the Anglo-American common law, which takes as its basic rule the *jus soli*: that citizenship derives, principally and without more, from birth within the territorial limits of the Nation.[3] It contrasts with the rule of the *jus sanguinis*, used by most civil law countries, under which nationality descends by bloodline; and it is a rule uniquely appropriate for a Nation of immigrants, whose members have, since the beginning, aspired to create a national identity associated with a new place and liberated from the old world's preoccupations with blood lineage. Questioned only once, in *Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), the principle of *jus soli* was enshrined after the Civil War in the Constitution, beyond the ordinary reach of courts and politicians. In this country there was never to be a second generation of non-citizens.

Precisely because our fundamental rule of citizenship is one of birth within this country, regardless of parentage, the situation is altogether different with respect to any child born abroad. Such a child is an alien by birth, and

> can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon

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[3] The Fourteenth Amendment also recognizes the *jus soli*'s narrow exception for persons born within a nation but not "subject to the jurisdiction thereof." In this country, that exception has been held to cover not only the traditional categories of children of foreign diplomats, those born on foreign ships, and those born to hostile occupying forces, but also the unique case of tribal Indians, who were considered to be subject, in the first instance, to the sovereign jurisdiction of their respective Tribes. See *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884); see also 8 U.S.C. 1401(b) (extending citizenship at birth to members of Indian Tribes).

> foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings * * * [under] the ordinary provisions of the naturalization acts.

Wong Kim Ark, 169 U.S. at 702-703.

The Constitution commits the sovereign power to "establish an uniform Rule of Naturalization" for the United States to Congress. Art. I, § 8, Cl. 4. "No alien has the slightest right to naturalization unless all statutory requirements are complied with," *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917), and "th[is] Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971). Any child born outside the United States therefore becomes a United States citizen if, but only if, Congress has made some specific statutory provision to that effect, and then only upon strict compliance with any conditions that Congress has seen fit to impose.

B. The Rules Enacted To Govern The Acquisition Of Citizenship By Children Born Abroad Are Designed To Ensure Some Real Connection Between The Child And The United States

1. *General provisions*

Congress has, over the years, adopted various different rules to govern the acquisition of citizenship by the foreign-born children of United States citizens. See generally *Bellei*, 401 U.S. at 823-826. Since 1790, however, congressional policy has consistently reflected at least two themes. The first is that the foreign-born children of citizens should in some circumstances be granted United States citizenship. The second, by contrast, is a concern that a foreign-born child related by blood to a citizen but lacking any personal tie to the United States—its territory, its culture, or its institutions—should not automatically become a citizen. That concern has found expression in different ways, including in requirements that a citizen parent have resided in this country before the birth of a child abroad and that the child reside in the United States for some significant period before reaching a certain age. *Ibid.*

The first congressional enactment relating to foreign-born children provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. The proviso served to ensure that, just as generations of children born in this country were not to remain "aliens" simply because they descended from alien parents, so too generations of children born abroad were not to become "citizens" by virtue of a mere blood relationship, unaccompanied by any other tie to this country. That principle has persisted through the years. See *Bellei*, 401 U.S. at 823-824 (describing history).

In 1933, President Roosevelt directed the Secretary of State, the Secretary of Labor (who then had jurisdiction over the Immigration and Naturalization Service), and the Attorney General "to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to the Congress." *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Sess., Pt. 1, at V (House Comm. on Immigration and Naturalization 1939) (the Proposed Code). That committee produced a proposed new nationality code, extensively annotated with explanatory comments, which the President submitted to Congress in 1938 (*ibid.*) and

which formed the basis for the Nationality Act of 1940, ch. 876, 54 Stat 1137.

"The problem of the child born abroad to parents of different nationalities was the subject of extended consideration" in developing the new draft nationality code. Proposed Code VI. The drafters noted, for example, that "[t]he problem of acquisition of citizenship *jure sanguinis* ha[d] been a subject of considerable discussion in recent years," with proposals ranging from simply allowing foreign-born children of citizen mothers, like those of citizen fathers, to become citizens at birth (which was not the general rule until 1934; see note 7, *infra*) to abolishing the principle of blood transmission altogether. *Id.* at 9-10. After discussing the issue at some length (see, *e.g.*, *id.* at 8-11, 13-14), the drafting committee, "fully intending that its proposal should carry out the principle of equality between men and women in the matter of nationality" (*id.* at 10-11), chose to balance competing concerns by dealing separately with various potential circumstances of birth abroad, and allowing those circumstances to determine the degree to which it was desirable to require indications of connection to the United States beyond the simple fact of blood descent.

The drafters noted, for example, that in the "great majority" of foreign-birth cases, "husband and wife [were] both citizens of the United States," and that "[i]n such cases it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character." Proposed Code 11. Section 201(c) of the draft (*id.* at 8), which became Section 201(c) of the Nationality Act (54 Stat. 1138) and is now Section 301(c) of the INA (App., *infra*, 2a), therefore confers citizenship on any child born abroad to a citizen couple, retaining only the requirement that at least one parent have previously "had a

residence in the United States." The latter restriction "seem[ed] quite desirable, since it would not be a wise policy to extend citizenship indefinitely to generations of persons born and residing in foreign countries." Proposed Code 11.

Conferring citizenship at birth on the foreign-born children of mixed-citizenship couples presented, in the drafters' view, "greater difficulties," and "require[d] correspondingly stricter limitations." Proposed Code 11. In that context, the drafters proposed that citizenship be conferred only if the citizen parent had resided in the United States for at least ten years before the child's birth abroad, and generally subject to the condition that the child reside in the United States for at least five years between the ages of 13 and 21, and take an oath of allegiance within six months after turning 21. *Id.* at 13-14.[4] After extensive consideration in committee, Congress eliminated the oath of allegiance, toughened the parental residency requirement, and altered the wording slightly, but otherwise adopted the drafters' proposal as Section 201(g) of the 1940 Act.[5] The residency requirements applicable to both

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[4] The Proposed Code explained (at 14) that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character." The residency requirement for retention of citizenship by the child was not to apply if the citizen parent was working abroad for the United States government or certain American institutions, on the theory that such parents were likely to "retain their American sympathies and character" and to "bring up their children as Americans." *Ibid.*

[5] 54 Stat. 1139. See H.R. Conf. Rep. No. 3019, 76th Cong., 3d Sess. (1940); S. Rep. No. 2263, 76th Cong., 3d Sess. 4 (1940); H.R. Rep. No. 2396, 76th Cong., 3d Sess. (1940); *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 28-29, 35-42, 44-50, 57-61, 207-209, 241-242, 259, 297-301, 333-335, 362 (printed 1945) [*1940 Hearings*].

parents and children have been progressively reduced over the years, but the same basic provision remains in force today as Section 301(g) of the INA (App., *infra*, 3a).[6]

2. *Provisions with respect to illegitimate children*

We have discussed the history of these general provisions in some detail because it is important to understand the degree to which Congress has always been concerned, and certainly the degree to which it was concerned in 1940, that United States citizenship not be conferred automatically on a child born abroad unless there is some reason to believe that he or she has a more genuine and substantial connection to the United States than that provided by mere blood relationship to one citizen parent. That point is of considerable relevance to the present case.

Before the Nationality Act of 1940, the relevant statutory provision (Section 1993 of the Revised Statutes of 1874) did not deal specifically with the issue of illegitimate children.[7] Section 1993 was administratively interpreted

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[6] Congress has varied the applicable residency requirements considerably over time. See Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139 (ten years' U.S. residence, at least five after age 16, for parent, and five years' U.S. residence between ages 13 and 21 for child); Immigration and Nationality Act, ch. 477, § 301(a)(7) and (b), 66 Stat. 236 (1952) (ten years, at least five after age 14, for parent, and five years between ages 14 and 28 for child); Act of Oct. 27, 1972, Pub. L. No. 92-584, § 1, 86 Stat. 1289 (same for parent, two years between ages 14 and 28 for child); Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046 (same for parent, none for child); Immigration and Nationality Act Amendments of 1986 (INAA), Pub. L. No. 99-653, § 12, 100 Stat. 3657 (five years, at least two after age 14, for parent, none for child).

[7] Section 1993 originally referred to "[a]ll children * * * born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof." As amended in 1934 (Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797), Section 1993 referred to any such child "whose father or mother or both * * * is a

to apply to such a child claiming through a citizen father if the child was later legitimated, by marriage of the father to the child's mother or otherwise, in accordance with the laws of the father's domicile. See Proposed Code 17-18; 32 Op. Att'y Gen. 162 (1920); 39 Op. Att'y Gen. 556 (1937). In the case of an illegitimate child claiming through a citizen mother, the State Department for some years interpreted Section 1993 to permit acquisition of citizenship if the identity of the child's father had not been legally established by legitimation or adjudication (on the ground, before 1934, that the mother in such cases stood in the position of the father). Proposed Code 18. The Attorney General, however, rejected that view, at least with respect to children born before 1934. 39 Op. Att'y Gen. 290 and 397 (1939).

The 1940 Act, following the recommendation of the Proposed Code (at 17-18), for the first time explicitly addressed the issue of children born abroad out of wedlock. Section 205 of that Act provided that Sections 201(c) and (g), among others, should apply to a child born out of wedlock, "provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139. In the absence of legitimation or adjudication, Section 205 provided that such a child could acquire United States nationality through a citizen mother, so long as the mother "had previously resided in the United States." *Id.* at 1140.[8] Those provisions were somewhat re-

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citizen." See *Bellei*, 401 U.S. at 824. Congress recently provided for retroactive application of the 1934 amendment. See 8 U.S.C. 1401(h).

[8] See also committee reports cited at note 5, *supra*; *1940 Hearings* 3, 43, 62-63, 207-209, 302.

vised and reenacted in 1952 as Sections 309(a) and (c) of the INA.[9]

In 1986, responding in large part to the State Department's request to reduce the administrative burdens involved in ascertaining paternal domiciles and keeping track of widely variant requirements for formal legitimation, Congress amended Section 309(a) to simplify its application in many cases.[10] The present version of Section 309(a) (App., *infra*, 4a) provides that the rules applicable, under Section 301(g), to the foreign-born child of a citizen who is married to an alien shall also apply to the illegitimate child of a citizen father and an alien mother, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to support the child financially until the age of 18, and (iii) before the child turns 18, he or she is legitimated under the laws of his or her residence or domicile, paternity is established by adjudication, or the father acknowledges paternity in writing under oath.[11]

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[9] 66 Stat. 238-239. See also H.R. Conf. Rep. No. 2096, 82d Cong., 2d Sess. (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 1-3, 39 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 24-28, 76, 241 (1952).

[10] INAA § 13, 100 Stat. 3657; see also *Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 118-120, 150 (1986) [*1986 Hearing*]. Congress revised the format of Section 309(a), without substantive change, in the Immigration Technical Corrections Act of 1988 (ITCA), Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

[11] Petitioner falls within a transition rule that allows her to select application of Section 309(a) either as amended in 1986 or before the amendment (when it required that paternity be "established while such child is under the age of twenty-one years by legitimation," 8 U.S.C. 1409(a) (1982)). See INAA § 23(e)(3), as added by ITCA § 8(r), 102 Stat. 2619. We are not aware that petitioner has made an election under that rule. We address the new provision, which is of more general interest.

The 1986 amendments did not change Section 309(c), which continues to provide that a child born abroad out of wedlock "shall be held to have acquired at birth the nationality status of his mother, * * * if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

III. THE RULES FOR NATURALIZATION AT BIRTH ESTABLISHED BY SECTION 309 ARE FULLY CONSISTENT WITH THE CONSTITUTION

A. Congressional Choices In The Field Of Immigration And Nationality Are Entitled To Extraordinary Deference

Every federal statute is entitled to a presumption of constitutionality, and, under any circumstances, "[j]udging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). In the special context of legislation concerning immigration and nationality, however, this Court has particularly "underscore[d] the limited scope of judicial inquiry." *Fiallo*, 430 U.S. at 792. Indeed, the Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Ibid.*, quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909); see also, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 79-82 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) ("As to the extent of the power of Congress under review, there is not merely 'a page of history,' * * * but a whole volume."); *Harisiades* v. *Shaughnessy*, 342 U.S. 580,

588-589 (1952); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711-713 (1893).

Deferential review of legislation concerning immigration and nationality is not a relic of the legal past. It rests, first, upon the Constitution's textual commitment to Congress of the power "[t]o establish an uniform Rule of Naturalization * * * throughout the United States." Art. I, § 8, Cl. 4. That commitment, in turn, rests on the basic principle that the power to admit or exclude aliens, including the powers to prescribe conditions for their entry or continued presence and to specify whether and how persons not born in this country may become citizens, is a necessary and inherent attribute of national sovereignty. See, *e.g.*, *Fiallo*, 430 U.S. at 792; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953). Moreover, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades*, 342 U.S. at 588-589. The development and implementation of those policies are necessarily committed exclusively to the political Branches, in part because they often depend on an evaluation of, and adaptation to, circumstances and policies in foreign lands, and therefore lie beyond the institutional competence of the judiciary.

Finally, policies toward the admission to this country, and most especially to full citizenship therein, of those not born here are uniquely political in character, dealing as they do with the threshold question of who is entitled to any share in the benefits, protections, and responsibilities of the democratic compact that the Constitution represents. See, *e.g.*, *Verdugo-Urquidez*, 494 U.S. at 265-266.[12]

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[12] See also 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 237 (1966) (remarks of Gouverneur Morris) ("every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted").

That compact is in some respects a social contract, but it was never intended, and has never been interpreted, to confer rights on all the world as third-party beneficiaries. See *Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring) ("It is not for this Court to reshape a world order based on politically sovereign States."); compare *Verdugo-Urquidez*, 494 U.S. at 270-275. The judiciary has an unquestioned role in protecting rights accorded to citizens and legal residents of this country under the Constitution, and, at least where so provided by Congress, in ensuring that the procedures used to implement Congress's substantive policy decisions with respect to immigration and nationality are fair. Those substantive decisions themselves, however, involve the exercise of sovereign rights, fundamentally democratic and majoritarian in nature, and reflect "political polic[ies], belonging to the political branch of the Government [and] wholly outside the concern and the competence of the Judiciary." *Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring); see also *Galvan*, 347 U.S. at 531-532.

It is for these basic reasons, as cogent now as they have always been, that the principle of deference to congressional decisions concerning immigration and naturalization "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo*, 430 U.S. at 792 n.4, quoting *Galvan*, 347 U.S. at 531. The Court has steadfastly declined to retreat from that principle, despite repeated invitations to do so. *Fiallo*, 430 U.S. at 792 n.4; *Mandel*, 408 U.S. at 767; *Galvan*, 347 U.S. at 530-532. There is no reason to adopt any different approach in this case.

B. The Distinctions Drawn In Section 309 Are Tied To Legitimate Congressional Concerns

The Court's order granting review in this case poses the question whether the distinctions drawn in Section

309 between the illegitimate foreign-born children of citizen fathers and those of citizen mothers violate the Fifth Amendment. 117 S. Ct. 1689. In considering that question, it is necessary both to delineate what distinctions Section 309 actually draws, and to consider Congress's purposes in drawing them. In this case, adjudication of petitioner's application for registration as a citizen progressed only far enough for the Department of State to conclude that she had not demonstrated that her putative father had legitimated or acknowledged her before the age of 18 (see Pet. App. 33-34), and the validity of that requirement is all that is strictly at issue in this action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, for judicial review of the Department's decision. See J.A. 7. For the sake of completeness, however, we shall address the other features of Section 309 as well.

1. *Acknowledgment and financial support*

As amended in 1986, Sections 309(a)(3) and (4) require that a child born abroad out of wedlock who claims citizenship through a citizen father establish both that the father has legitimated, formally acknowledged, or been adjudged the father of the child, and that he has agreed in writing to provide financial support during the child's minority. To some extent, those requirements serve, as did the sole option of legal legitimation under prior law, to address "the serious problems of proof that usually lurk in paternity determinations." *Fiallo*, 430 U.S. at 799. More significantly, however, they help to ensure both that such a child has some genuine tie to the United States, and that he or she is in a position roughly equivalent to that of the typical foreign-born child claiming through an unmarried citizen mother. A mother has an established legal relationship with her child from the moment of birth; and, like any parent, she will normally be legally responsible for the child's support during minority. See, *e.g.*, Tex. Fam. Code

Ann. §§ 151.001(a) ("The parent-child relationship may be established between a child and: (1) the biological mother by proof of her having given birth to the child."), 151.003 (parental duty to support) (West 1996). Moreover, because an illegitimate child typically remains in the custody of the mother (as did petitioner in this case), enforcement of that financial obligation is generally not a significant issue. And, if such a child came to the United States with his or her mother, there would be no question of a State's ability to enforce the mother's support obligations.

The same legal obligations rest on the father of a child born out of wedlock only if paternity has been legally established. See, *e.g.*, Tex. Fam. Code Ann. § 151.001(a) (West 1996) (parent-child relationship with father to be established "as provided by this code"). Unfortunately, both history and contemporary experience demonstrate the frequent difficulty, even in the purely domestic context, of establishing and enforcing that obligation in the frequent instances in which the father is absent or unwilling. See generally, *e.g.*, *Blessing* v. *Freestone*, 117 S. Ct. 1353 (1997) (discussing extensive federal requirements addressed to establishing paternity and enforcing child-support obligations); S. Rep. No. 1356, 93d Cong., 2d Sess. 42 (1974) (new federal requirements would "help children attain th[e] right [to paternal support], including the right to have their fathers identified so that support can be obtained"). When Congress liberalized Section 309(a) in 1986 to allow a child claiming citizenship to show only that a citizen father had acknowledged paternity in writing under oath, there was justifiable concern that relaxation of the previous legal legitimation requirement might make it more difficult to seek or obtain enforcement of the father's financial obligations in the United States.[13] The

[13] See *1986 Hearing* 150 (statement of Asst. Sec'y of State for Consular Affairs) ("The purpose of this clause is to facilitate the

written agreement addresses that concern, and also provides for support in situations in which the child remains abroad (presumably with an alien mother) in a jurisdiction where paternal support obligations might not otherwise extend or be enforceable. While the acknowledgment and written support agreement required by Sections 309(a)(3) and (4) may be no more effective a guarantee of support than are the mother's pre-existing legal relationship and obligations, requiring them from a foreign-born illegitimate child who claims citizenship through a citizen father helps, again, to ensure that the child has a nexus to a citizen parent (and therefore to this country) that goes beyond mere biological descent, and that the child is actually comparably situated to one claiming through a citizen mother, who would be subject to the legal enforcement of parental obligations. Compare *Lehr* v. *Robertson*, 463 U.S. 248, 259-268 (1983); *Quilloin* v. *Walcott*, 434 U.S. 246, 256 (1978).

2. *Acknowledgment or legitimation by age 18*

Section 309(a)(4) requires a showing that a citizen father legitimated or acknowledged the child claiming citizenship while the child was under the age of 18. Because Section 309(c) does not require explicit acknowledgment by a citizen mother (whose legal relationship to the child is sufficiently established at birth), it includes no comparable deadline.

It is important to note that the provision for acknowledgment in Section 309(a)(4) is separate from proof of blood relationship. While the threshold need for such proof was previously subsumed under the requirement that "paternity * * * [be] established while [the] child is under the

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enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states."); see also *id.* at 144.

age of twenty-one years by legitimation" (8 U.S.C. 1409(a) (1982)), Congress's 1986 revision provides for proof of biological paternity in Section 309(a)(1), without imposing any limitation other than that the proof be clear and convincing.[14] The time limit for meeting the legitimation-or-acknowledgment requirement of Section 309(a)(4) must therefore reflect, at least in part, some other congressional concern.

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[14] For that reason, arguments concerning recent developments in genetic testing (see Pet. Br. 18-19; Pet. App. 18 (opinion of Wald, J.)) are beside the point. The State Department has never required such testing, or less reliable forms of blood testing that have been available for some time, in determining biological paternity, in part because it is expensive and often unavailable overseas. See 7 United States Dep't of State, *Foreign Affairs Manual* 1131.5-4(c). On the other hand, the Department has never declined to recognize such testing, if performed by a competent and trustworthy laboratory, as acceptable evidence of biological paternity. *Ibid.* Moreover, although the concurring opinion below emphasizes Congress's recognition of genetic testing as a reason for eliminating "arbitrary time limitations" for proving paternity in the context of toughened efforts to collect child support from unwed fathers in this country (Pet. App. 19), we note that such determinations are generally limited to the period of the child's minority, which coincides with (i) the period in which a father is normally required by law to support his child, (ii) the period in which the immigration laws typically allow a child to derive naturalization or immigration benefits from his or her parents (see note 15, *infra*), and (iii) the time limits for financial support and for formal legitimation or acknowledgment imposed by Sections 309(a)(3) and (4). Compare 42 U.S.C. 666(a)(5), as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 331, 110 Stat. 2227-2230 (requiring States, as a condition of receiving federal child support enforcement funds, to permit establishment of paternity at any time before the child reaches 18 years of age and to provide other procedures for acknowledging or proving paternity); H.R. Rep. No. 527, 98th Cong., 1st Sess. 38 (1983); *Clark* v. *Jeter*, 486 U.S. 456, 460 (1988) (discussing 42 U.S.C. 666(a)(5) and invalidating six-year statute of limitations on paternity actions).

We think that concern is the longstanding one discussed at length above: that citizenship not devolve automatically on a foreign-born child who is unlikely to develop, in his or her formative years, substantial personal ties to the United States. Compare *Lehr*, 463 U.S. at 266-267. As the court of appeals recognized (Pet. App. 10), the acknowledgment requirement is calculated to help ensure the existence not only of a biological relation but also of some personal relationship between an illegitimate foreign-born child and the father through whom he or she seeks to derive citizenship. Insisting that that requirement, and the financial support requirement of Section 309(a)(3), be met before the child has reached adulthood helps in part to ensure that the child will not become a public charge. In addition, however, it provides some assurance that the father's commitments to the child will be real, not formulaic, and that the child's ties to his or her citizen parent, and therefore to the United States, will at least begin to develop during childhood, when they are most likely to take deep root and to meaningfully distinguish the foreign-born child of a citizen from any other individual born abroad who ultimately decides, as an adult, that he or she would like to immigrate to the United States.[15]

That Congress has spelled these particular requirements out in connection with claims to citizenship by the illegitimate children only of citizen fathers, not citizen mothers, reflects nothing more than the reality that a

[15] In a related context, a foreign-born child who does not become a citizen at birth is entitled, under certain circumstances, to derivative naturalization if one or both of his parents is naturalized—but only if the naturalization occurs before the child turns 18. See 8 U.S.C. 1431-1432. After that age, regardless of other circumstances, the child is treated as an adult alien, who must meet all of the requirements for naturalization on his or her own behalf. See also 8 U.S.C. 1101(b)(1), 1153(d).

child born abroad to an unmarried American mother has an established legal relationship with a citizen parent at birth, and is sufficiently likely also to have a substantial personal relationship that there is no need to require further evidence of early and significant ties to this country. In the case of illegitimate foreign-born children of American fathers, on the other hand, there is no such established legal relationship at birth, and Congress could reasonably have expected that the usual scenario would bear a much greater resemblance to—for example—the facts of this case.[16] In these respects, as this Court has said in a different context (*Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975)), "the different treatment of [the children of] men and women * * * reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female * * * [citizen parents] are *not* similarly situated with respect to" their immediate and likely ongoing relationship with a child born to them and an alien partner, overseas and out of wedlock.

This Court has recognized, in a case with facts in some ways strikingly similar to this one (although in the domestic context), that the mothers and fathers of children born out of wedlock may not be similarly situated for purposes of constitutional analysis. In *Lehr* v. *Robertson*, the Court refused to hold that a child's natural father had

[16] An American man, overseas briefly on temporary military duty, has an affair of unclear origin, duration or substance with an alien woman. Having allegedly fathered a child, who remains with her mother, he returns home, developing no parent-child relationship with his putative daughter during her minority. Twenty-one years later, the child, having lived all her life with her mother and having been raised entirely abroad, applies for recognition as a United States citizen, on the basis of a bare biological relationship—buttressed only slightly, in this case, by her father's willingness to sign papers that at this point involve no financial commitment and have, at best, highly uncertain emotional or personal significance.

an absolute right to prior notice of adoption proceedings to safeguard his "inchoate relationship with a child whom he ha[d] never supported and rarely seen in the two years since her birth." 463 U.S. at 249-250. Quoting with approval Justice Stewart's observation that "[p]arental rights do not spring full-blown from the biological connection between parent and child," but "require relationships more enduring" (*id.* at 260), the Court made clear that "the mere existence of a biological link does not merit * * * constitutional protection" equivalent to that accorded to true family relationships (*id.* at 261 & n.17). Thus, "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion" (*id.* at 266); and in a case in which "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights" (*id.* at 267-268; footnote omitted).

The father and mother of an illegitimate child are differently situated not only with respect to proof of their biological relationship with the child, but also with respect to the very nature of that relationship from its inception. Cf. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 895-898 (1992); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 69-71 (1976). Moreover, in this case, as in *Lehr*, petitioner's mother and her putative father have little in common in terms of their legal relationship to her during her childhood, the parental responsibilities that they actually assumed, and the family relationships that in fact developed. Compare, *e.g.*, Pet. App. 13 (petitioner had no parental relationship with her father) with J.A. 18-24 (detailing petitioner's family history in the Philippines). In the context of Section 309, that factual pattern is not only typical, but highly relevant to the congressional concern with

whether an illegitimate foreign-born child claiming citizenship has ever enjoyed any substantial familial relationship with his or her citizen father during his or her formative years. As in *Lehr*, Congress is not constitutionally required to ignore real differences in the situation of citizen mothers and fathers in framing rules for the conferral of nationality at birth.

Also as in *Lehr*, the congressional scheme here is not "likely to omit many responsible fathers" (463 U.S. at 264), because Section 309(a) allows any citizen father who is aware that he has fathered a child abroad out of wedlock, and is willing to embrace the joys and burdens of parenthood, to take simple steps to substantiate that relationship and, in so doing, to transmit his American citizenship. Where, however, a citizen father has neither acknowledged nor supported such a child at any time during the child's minority, Congress has made a reasonable judgment that the child is not sufficiently likely to have developed early and substantial family ties to the United States to justify an automatic grant of citizenship on the basis of a biological relationship alone. Compare *Lehr*, 463 U.S. at 259-268.

3. *Clear and convincing evidence of blood relationship*

As we have noted, Section 309(a)(1) requires a child claiming through a putative citizen father to establish the alleged blood relationship by "clear and convincing" evidence—a requirement not imposed, in those terms, on a child claiming through a citizen mother under Section 309(c). A child claiming under Section 309(c) must, however, establish maternity, just as a child claiming under Section 309(a) must establish paternity. The proof offered will usually be a birth certificate or other local birth record; and for purposes of establishing a blood relationship with the mother, such a record will normally be clear and convincing evidence. If there is any doubt on that score,

the State Department will investigate and require whatever further evidence it deems necessary. See, *e.g.*, 7 United States Dep't of State, *Foreign Affairs Manual* 1131.4, 1131.5-4(b)-(c), 1133.6 (rev. 12/31/84). There is therefore little practical difference in the proof of blood relationship required under either provision. The fact that Section 309(a)(1) spells out a specific standard of proof simply reflects the fact that serious doubts concerning biological paternity are common, while similar doubts concerning biological maternity are rare. See, *e.g.*, *Parham* v. *Hughes*, 441 U.S. 347, 355 & n.7 (1979) (plurality opinion); *Lalli* v. *Lalli*, 439 U.S. 259, 268-269 (1978) (plurality opinion).

4. *Parental residency*

Because Section 309(a) refers back to the requirements applicable, under Section 301(g), to the children of married couples, an illegitimate child whose mother is not a citizen will not acquire citizenship from his or her father under Section 309(a) unless the father meets the residency requirement set out in Section 301(g) (presently five years, at least two of them after attaining the age of 14). An illegitimate child claiming through a citizen mother under Section 309(c), on the other hand, need only show that the mother was "physically present in the United States * * * for a continuous period of one year" at some point before the child's birth.

We note, first, that the transmission requirement applicable to citizen fathers under Section 309(a) applies by cross-reference, and is the same as that applicable under Section 301(g) to a citizen father or mother who has a child overseas while married to a spouse who is not a citizen. Thus, Section 309(a) does not impose on illegitimate children born overseas to citizen fathers a parental transmission requirement more onerous than the norm; rather, Section 309(c) applies a special, unusually generous rule to

the children of citizen mothers who give birth abroad and out of wedlock.

The Proposed Code submitted to Congress in 1938 suggests two possible reasons for this distinction. First, the drafters' commentary indicates the expectation that a citizen mother would likely have custody of any child born abroad out of wedlock. Proposed Code 18; compare *Quilloin*, 434 U.S. at 249 & n.5; *Lalli*, 439 U.S. at 268.[17] Because, in such a situation, the child would likely be raised primarily by his or her one citizen parent, the situation would be similar, in terms of likely American acculturation, to that of a child living abroad with parents both of whom were citizens, and there would be little reason to require any more than the minimal prior parental residence required in the case of married citizen couples.

Second, the Proposed Code reveals a concern with coordinating American law with that of other countries in this area. The drafters noted (Proposed Code 18) that "the laws of some thirty foreign countries contain provisions for the nationality of illegitimate children, * * * and in all but Turkey such children follow the mother's nationality in the absence of any act legally establishing [paternal] filiation." Thus, the illegitimate child of a United States citizen mother and a foreign father—unlike the illegitimate child of an American father and a foreign mother—might well not be recognized as a citizen or national by the country where the child was born (or the country of which the father was a citizen).[18] Congress therefore had good

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[17] Compare, *e.g.*, United States Dep't of Commerce, Bureau of the Census, *Current Population Reports*, No. P20-48, "Household and Family Characteristics: March 1995," at 5 (mother-child families accounted for 85% of single-parent households with minor children).

[18] We are informed by the Department of State that it has consulted, in connection with this case, with consular officers in six nations in which the United States has or has had a significant military pres-

reason to provide a special rule for transmission of American citizenship to the children of citizen mothers, in order to harmonize United States law with relevant foreign laws on this issue and to minimize the potential problem of statelessness that might otherwise arise. See also S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (Section 309(c) "insures that the child shall have a nationality at birth").

C. Section 309 Is Constitutional Under *Fiallo* v. *Bell*

As we have explained, the nationality provisions of Section 309, including its limited distinctions between the illegitimate children of citizen mothers and those of citizen fathers, are entitled to exceptional deference from this Court. In *Fiallo* v. *Bell* and *Kleindienst* v. *Mandel*, the Court held that an exercise of the immigration and naturalization power would be upheld so long as it was based on "a facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794, quoting *Mandel*, 408 U.S. at 770; see also *Diaz*, 426 U.S. at 83 (upholding classification affecting aliens as not "wholly irrational").[19]

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ence and which, not coincidentally, account for a large proportion of citizenship claims by illegitimate children born abroad. The Department reports that the problem of foreign law identified in the text remains a clear concern today in at least Germany, Great Britain, South Korea and Vietnam. Recent legal changes in the Philippines and Thailand have allowed an illegitimate child born there of a non-national mother to acquire Philippine or Thai nationality, respectively, if the father is a Philippine or Thai national and complies with the requirements of local law. The possibility of statelessness remains, however, in all other cases, unless the mother can transmit her citizenship in accordance with the law of her own country.

[19] In our view, the "facially legitimate" standard applied in immigration and nationality cases is more deferential even than the familiar "rational basis" standard applied in the context of purely domestic legislation. But see *Ablang*, 52 F.3d at 804, citing *Wauchope*, 985 F.2d at 1414 n.3; *Azizi* v. *Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

Fiallo involved a challenge to Section 101(b) of the INA, 8 U.S.C. 1101(b) (1976), a definitional provision that had the effect of granting preferential immigration status to certain children (under the age of 21) and parents of United States citizens. See 430 U.S. at 788. In the case of children born out of wedlock, the law recognized the mother's relationship to the child under all circumstances, but it recognized the father's relationship only if the child was legally legitimated before the age of 18 and while in the legal custody of the father. *Id.* at 788-789 & n.1. That distinction was challenged on the ground that it represented "'double-barreled' discrimination based on sex and illegitimacy, infringed upon the due process rights of citizens and legal permanent residents, [and] implicated 'the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship.'" *Id.* at 794.

In rejecting those arguments, the Court recognized that the challenged distinction was "just one of many drawn by Congress pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions." 430 U.S. at 797. After "underscor[ing] the limited scope of judicial inquiry into immigration legislation" (*id.* at 792), and emphasizing that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision" (*id.* at 799), the Court deferred to Congress's "obvious[] * * * determin[ation] that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems

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The difference is not critical here because, for the reasons stated, the distinctions drawn by Section 309 are plainly rational. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319-321 (1993) (discussing "rational basis" standard).

of proof that usually lurk in paternity determinations" (*ibid.*). Noting that "[t]he inherent difficulty of determining the paternity of an illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier" (*id.* at 799 n.8), the Court acknowledged that "there are widely varying relationships and degrees of kinship," and that in "the inevitable process of 'line drawing'" it was "appropriate for Congress to consider not only the nature of these relationships but also problems of identification, administration, and the potential for fraud" (*id.* at 795 n.6). In response to the contention that the provision was "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children," and that existing administrative procedures "could easily handle the problems of proof involved," the Court "simply note[d] that this argument should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.

As the court of appeals recognized, the Court's analysis in *Fiallo* compels the conclusion that Section 309 is constitutional. Pet. App. 10-14; see also *Ablang* v. *Reno*, 52 F.3d 801, 805-806 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). The congressional concerns accepted as valid by the Court in *Fiallo*—that paternity is more likely to be in doubt, and may be more difficult to prove, than maternity, and the greater likelihood that an illegitimate foreign-born child would develop early and close ties to a citizen mother as opposed to a citizen father—also animate, as we have explained, the distinctions drawn by Congress in the treatment of children who claim citizenship through citizen fathers under Section 309(a) and those who claim through citizen mothers under Section 309(c). Indeed, those distinctions are, if anything, even more clearly permissible than the ones at issue in *Fiallo*.

First, the reasonableness of the distinctions in Section 309 depends somewhat less on the difficulties inherent in proof of paternity, because Section 309(a)(1) merely requires that paternity be proved by any acceptable "clear and convincing evidence." As we have explained, that requirement does little more than place biological paternity, as a statutory criterion, on roughly the same footing as biological maternity, which must be established in order to claim citizenship under Section 309(c), but which will seldom be in doubt and will normally be proven clearly and convincingly by local records incident to the birth.

Second, after Congress's liberalization of Section 309(a) in 1986, the establishment of a personal or legal relationship indicative of ties to the United States no longer requires formal legal legitimation, as did both former Section 309(a) and the provision at issue in *Fiallo*. Rather, under amended Sections 309(a)(3) and (4)(B), an illegitimate foreign-born child who claims citizenship through his or her father need only show that the father acknowledged paternity, in writing and under oath, before the child turned 18, and agreed in writing to provide financial support while the child remained a minor. Any argument that Section 309(a) impermissibly ignores or impedes the possibility of responsible fatherhood is therefore even less persuasive than were the similar arguments advanced and rejected in *Fiallo*.

Third, *Fiallo* involved a direct assertion of the rights of American citizens. See 430 U.S. at 794-795 & n.6. In this case, by contrast, petitioner's father is not before the Court, and the only rights petitioner may assert are her own. See pages 10-12 & note 2, *supra*. As this Court has made clear, however, "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *Ginsberg*, 243 U.S. at 475. Although the Court has never adopted a rule of complete non-

reviewability in this area (see *Fiallo*, 430 U.S. at 793 n.5), the absence of any citizen party to this case makes petitioner's challenge to Congress's choices in framing Section 309 far weaker even than the challenge at issue in *Fiallo*.[20]

For all these reasons, the court of appeals correctly held that Section 309 must be sustained under *Fiallo*. Petitioner cannot plausibly contend either that the provisions of Section 309 are facially illegitimate, or that they were not adopted in good faith. Her constitutional challenge must therefore fail.

D. Petitioner's Arguments For Distinguishing Or Overruling *Fiallo* Are Unpersuasive

1. Petitioner (Br. 9-10) and her amici (Br. 18-20) are wrong to suggest that this case should be subject to a more stringent standard of constitutional review than that applied in *Fiallo* because this case involves Congress's choices in conferring citizenship on children born abroad, rather than their admission as permanent residents. As we have explained (see pages 12-14, *supra*), while almost

[20] As *Fiallo* held (430 U.S. at 794-795 & n.6.), even the involvement of citizens' rights would not substantially lessen the degree of deference the Court owes to congressional choices in the area of immigration and nationality. That deference ultimately rests in significant part on the nature of the legislative power exercised (see pages 21-23, *supra*), as well as on the fact that those most directly affected are generally aliens abroad who have no substantive rights under the Constitution. Moreover, as the Court recognized in rejecting a First Amendment claim in *Kleindienst* v. *Mandel*, the argument that enhanced review is appropriate whenever citizens' rights are affected "would prove too much," because there will be some such effect "[i]n almost every instance." 408 U.S. at 768. Certainly that is true of derivative citizenship claims, which will, by definition, involve at least a putative interest of at least one citizen parent. Recognizing such an "exception" would vitiate the rule of deference in the context of acquisition of nationality through birth abroad.

all persons born within the United States have a constitutional right to citizenship under the Fourteenth Amendment, any person born outside the country, regardless of parentage, may become a citizen only through the exercise of Congress's plenary power over naturalization. *Bellei*, 401 U.S. at 827-828; *Wong Kim Ark*, 169 U.S. at 701-703. That power is not fundamentally different when it is exercised "by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens," than when it is used to prescribe rules "enabling foreigners individually to become citizens by proceedings * * * [under the] ordinary provisions of the naturalization acts," and its exercise is entitled in either case to the same deferential standard of review. *Id.* at 703.[21]

2. None of the cases cited by petitioner or her amici calls into question *Fiallo*'s deferential approach to questions of immigration and nationality. Petitioner, for example, relies (Br. 12-14) on this Court's decisions in *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and *Plyler* v. *Doe*, 457 U.S. 202 (1982). In *Trimble*, the Court struck down a state intestate succession statute on the ground that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." 430 U.S. at 772. Given the ease with which a willing father may ac-

[21] See also *Ablang*, 52 F.3d at 805-806; *Wauchope*, 985 F.2d at 1414; *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990); *Villanueva-Jurado* v. *INS*, 482 F.2d 886, 887 (5th Cir. 1973) ("Congress has a completely free hand in defining citizenship as it relates to persons born abroad."). Petitioner relies (Br. 9-10) on dictum in *Wauchope*, but that case actually followed *Runnett* in applying the "facially legitimate and bona fide" standard articulated by this Court in *Fiallo*. Petitioner cites no holding by this Court or any court of appeals to the contrary, and we are aware of none.

knowledge his child under Section 309(a), thus ensuring the transmission of his citizenship, this case involves nothing like the flat bar at issue in *Trimble*. Even if it did, however, *Fiallo*, decided on the same day, explicitly distinguished *Trimble* on the ground that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' * * * as those in the domestic area." 430 U.S. at 799 n.6, quoting *Trimble*, 430 U.S. at 772. Indeed, *Fiallo* reiterated that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792.

Plyler, too, expressly reaffirmed the principle of deference to congressional decisions concerning "the character of the relationship between [an] alien and this country." 457 U.S. at 225. The Court specifically recognized "the federal prerogative to control access to the United States, * * * the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation," and the judiciary's "unusual deference" to Congress's "delicate policy judgments" with respect to "admission to our Nation and status within our borders." *Id.* at 219 n.19, 225. After pointing out (*ibid.*) that the States enjoy no similar power, the Court held only that a State could not deny an education to the children of aliens within its jurisdiction, whether or not they were lawfully present under federal law, unless it could show a substantial governmental interest in so doing. *Id.* at 230.

Petitioner's amici cite (Br. 13-18) *Landon* v. *Plasencia*, 459 U.S. 21 (1982), and *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). In *Landon*, the Court cited both *Fiallo* and *Kleindienst* in setting out, once again, the general principle of deference to Congress's exercise of the "sovereign prerogative" to admit or exclude aliens. 459 U.S. at 32. The Court went on to hold only that a permanent resident alien

who had been absent from the country for "only a few days" (*id.* at 34) was entitled to due process in her exclusion hearing, because "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, [her] constitutional status changes accordingly" (*id.* at 32). Nothing in our submission in this case is inconsistent with that proposition.

Rostker, which upheld Congress's exclusion of women from registration for the military draft, is an odd case to cite in support of petitioner's position. Petitioner's amici focus on the fact that the Court declined the government's invitation to state explicitly that all congressional decisions in the special context of the military would be reviewed under the traditional "rational basis" test. See 453 U.S. at 69. We note, however, that *Rostker* (which involved the rights of citizens, not aliens outside the United States) treated with the same skepticism both "[a]nnounced degrees of 'deference'" in particular contexts and "levels of 'scrutiny' which this Court announces that it applies to particular classifications." *Id.* at 69-70. Nonetheless, the Court explicitly recognized that "the [constitutional] tests and limitations to be applied [might] differ because of the military context." *Id.* at 67. We regard the principle of deference as more important than any particular verbal formula that may be used to represent it. In any event, apart from the fact that it arose in another specialized area in which the Court has traditionally accorded Congress's decisions particular deference (see *id.* at 64-65), *Rostker* bears scant resemblance to this case. Certainly it did not call into question the long line of cases dealing specifically with the equally special, but quite distinct, area of immigration and nationality. That is the area at issue here.

3. Finally, petitioner and her amici cite a variety of cases dealing with claims of gender discrimination in

purely domestic legislation, in which the Court has made clear that it will require the government to articulate an "exceedingly persuasive" justification before it will uphold legislative classifications that restrict the availability of rights or opportunities solely on the basis of gender. *United States* v. *Virginia*, 116 S. Ct. 2264, 2275-2276 (1996) (*VMI*). Those cases are inapposite here for at least two reasons.

First, the cases cited do not address legislation dealing with immigration or the naturalization of aliens abroad, and they provide no basis for overturning this Court's long history of according deference to congressional decisions in that sphere. The Court has previously applied the principle of deference in this area even in the face of claims based on, for example, rights under the First Amendment, to which this Court has traditionally accorded the most far-reaching constitutional protection. Compare *Mandel*, 408 U.S. at 765-770; *Galvan*, 347 U.S. at 530-532 (political affiliation). As *Fiallo* correctly recognized, there is no reason to apply any higher standard to a claim under the Fifth Amendment. See 430 U.S. at 794-795 (declining to vary *Mandel*'s standard in reviewing a claim of "'double-barreled' discrimination based on sex and illegitimacy"). Whatever a citizen's interest in the matter, the actual subject of an immigration or naturalization law like that at issue here is the alien abroad, who has no right to invoke the heightened scrutiny of gender-based distinctions that is required in other contexts by the United States Constitution.

Second, this case does not involve a legislative scheme that differentiates between otherwise similarly situated men and women on the basis of their gender. Petitioner is not treated any differently from a male child who is otherwise similarly situated. And even if we assume that petitioner may challenge any distinction between her father

(who is not before the Court) and a hypothetical unwed citizen mother, the differentiation in Section 309 is not based on invidious gender stereotypes, but on real differences in the situation of the citizen mothers and putative citizen fathers of illegitimate children born abroad. See pages 24-34, *supra*. The Fifth Amendment "embodies a general rule that [government] must treat like cases alike but may treat unlike cases accordingly." *Vacco* v. *Quill*, No. 95-1858 (June 26, 1997), slip op. 4. Here, "men and women are not similarly situated," and the "statutory classification is realistically based upon the differences in their situations." *Parham*, 441 U.S. at 354 (plurality opinion).[22]

IV. EVEN IF THE DISTINCTIONS DRAWN BY SECTION 309 WERE UNCONSTITUTIONAL, A COURT SHOULD NOT DECLARE PETITIONER TO BE A CITIZEN

Even if the Court were to disagree with our analysis and hold the distinctions drawn in Section 309 to be

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[22] For the reasons stated in the text, the distinctions drawn in Section 309 are constitutional even if, contrary to our submission, they are subject to the scrutiny ordinarily given to gender distinctions in the domestic context. The different treatment of the foreign-born children of citizen fathers and those of citizen mothers addresses significant differences in their status. The approach of Section 309, moreover, serves "important governmental objectives" in establishing paternity and in ensuring that the child has significant ties to the United States, and the "'means employed' are 'substantially related to the achievement of those objectives.'" *VMI*, 116 S. Ct. at 2275 (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). Indeed, as evidenced by *Clark*, *Lehr*, *Parham*, *Lalli* and *Quilloin*, fathers of illegitimate children are treated differently than mothers in a number of different contexts under domestic law. See also *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48-49 (1989) (applying traditional common-law rule that illegitimate child takes mother's domicile); *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

unconstitutional, the appropriate remedy would not be the one petitioner seeks—a judicial declaration that she is a citizen of the United States. The assertedly unconstitutional distinction at issue here is not between legitimate children, whose claims are governed by Section 301(g), and the illegitimate children whose claims are governed by Section 309. It is the distinction, wholly within the category of illegitimate children governed by Section 309, between those whose citizen parent is the father and those whose citizen parent is the mother. If the Court held that distinction unconstitutional, any remedial measure would have to focus on eliminating inequality between the two classes treated differently by Section 309. The remedy might consist of eliminating entirely Section 309's authorization for the naturalization of foreign-born illegitimate children, or of attempting to announce some rule under which Section 309 could be applied identically to children of citizen fathers and citizen mothers. In neither circumstance, however, would it be proper for a court to confer citizenship on petitioner.

A. Section 301(g) May Not Be Applied To A Child Born Abroad Out Of Wedlock

Petitioner contends (Br. 15) that if Section 309 of the INA were eliminated, she would be entitled to claim citizenship under Section 301(g). That is incorrect.

In *INS* v. *Pangilinan*, 486 U.S. 875 (1988), this Court held that a federal court has no equitable power to confer citizenship on a litigant as a remedy for a governmental violation of a statute under which he or she might otherwise have qualified for naturalization. *Id.* at 882-885. The Court made clear that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." *Id.* at 883-884. If Congress has set specific statutory limits on a

naturalization provision, then "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations." *Id.* at 885.

As we have explained, Section 301(g) of the INA may be traced back directly to Section 201 of the Nationality Act of 1940, which in turn resulted from a comprehensive reexamination and codification of United States nationality law. As a result of that process, new Sections 201(c) and (g) distinguished, for the first time, among different situations involving the birth of children outside the United States to citizen couples, on the one hand, and to couples only one of whom was a citizen, on the other. At the same time, Congress also enacted new Section 205 to deal specifically with the situation of children born abroad out of wedlock. The parallel structure was carried over to Sections 301 and 309 of the present INA. Thus, from the beginning, Congress has provided the "general rule" (Pet. App. 7) of Section 301(g) only in explicit conjunction with a *different* provision specifically applicable to the case of illegitimate children. The provisions must be read together (see, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)); and the proper reading is not, as petitioner suggests (Br. 14-15), that Section 301(g) "grants" citizenship which Section 309 then "takes away," but that Congress never intended Section 301(g) to apply at all to children born out of wedlock, except under the conditions prescribed by Section 309(a).

Section 309(a) states that the "provisions of" Section 301(g) "shall apply" to a person born out of wedlock to a citizen father only "if" certain stated conditions are met. Moreover, Section 309(c), which provides the necessary concomitant rules for illegitimate children born to a citizen mother, does not refer back to Section 301 at all.

The fact that Section 309(a) uses the shorthand of cross-reference should not obscure the fact that Congress enacted two separate provisions to deal with two separate situations. Indeed, the remedy petitioner seeks would be no more proper than if a court were to hold Section 301(g) unconstitutional and then to conclude that Section 301(c), which applies to two-citizen couples, could thereafter be applied to the child of a mixed-citizenship couple, *faute de mieux*. Sections 301(g) and 309(a) were enacted to apply to different situations, and a holding that the latter embodies unconstitutional distinctions would not make it permissible to extend the former beyond the scope that Congress intended it to have.

B. Remedial Expansion Of Section 309's Terms For Conferring Citizenship Would Be Inappropriate

The court of appeals therefore erred in concluding that there was any statutory authority apart from Section 309 for declaring petitioner to be a citizen. That conclusion does not necessarily end the remedial inquiry, because a court might also seek to remedy an equal protection violation by either expanding or limiting the benefits conferred by Section 309 itself so as to grant or deny them "equally" to all. *Heckler* v. *Mathews*, 465 U.S. 728, 738-740 (1984). In this case, however, as in *Heckler*, there are strong reasons to conclude that it would be inappropriate for a court to expand the unique benefit of citizenship to a class of persons on whom Congress has chosen not to bestow it.

1. First, as we have discussed, the area of nationality is an exceptionally important one, in which congressional power is at its peak, and judicial authority severely circumscribed. Likewise, as this Court has always recognized, the benefit of American citizenship is a particularly precious one. See, *e.g.*, *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). For those reasons, in naturalization cases Congress would be particularly unlikely to approve, and the courts should be particularly reluctant to supply, remedial solutions that go beyond what Congress itself has expressly chosen to authorize.

2. Second, nationality provisions such as Sections 309(a) and (c) are part of a reticulated statutory scheme, and a court must beware of attempting to pull one strand if it will not be able to reweave the tapestry. In this case, it is difficult to see exactly how the provisions at issue might be equitably "equalized." Striking the "burdens" of Section 309(a) in favor of equal application of the "benefits" of Section 309(c) would confer citizenship (presumably retroactively) on thousands of foreign-born children with literally no connection to this country other than a blood relationship to a citizen father they have never known or even seen. In addition, it would have the anomalous result of according an illegitimate foreign-born child with only one citizen parent the benefit of a parental residency requirement substantially more favorable than that applicable to the child of a mixed-citizenship *married* couple under Section 301(g), and in one respect more favorable than that applicable to the child of a two-citizen married couple under Section 301(c). On the other hand, nullifying the challenged benefits of Section 309(c) not only would subject the illegitimate children of citizen mothers to a substantially enhanced parental residency requirement, with the concomitant increase in the risk of statelessness that we have described (see pages 33-34, *supra*), but also would give rise to perplexing questions of what action, exactly, the State Department should require a citizen mother to have taken by the time her child turns 18 in order to satisfy an acknowledgment-or-legitimation requirement designed to accommodate the very different legal situation of unwed fathers.

In short, the courts do not have the institutional competence to craft a nuanced remedy that might properly take into account all the interests that Congress had in view when it crafted Section 309. See *Califano* v. *Westcott*, 443 U.S. 76, 92-93 (1979). Without such crafting, however, there can be no firm basis for believing that a court's remedial solution will approximate what Congress would have chosen had it been forced to consider the problem under newly announced constitutional constraints. Under such circumstances, respect for the legislative function in this particularly important and sensitive area suggests that, while a court may declare that the distinctions drawn in Section 309 are unconstitutional, it should, under *Pangilinan*, avoid expanding the class of persons to whom citizenship is accorded beyond the limits that Congress has specifically approved, and should leave to Congress the task of deciding how to rework the statutory scheme to achieve its legislative goals in a constitutional manner. See *Mathews*, 465 U.S. at 739 n.5 ("[T]he court should not, of course, 'use its remedial powers to circumvent the intent of the legislature,'" and "should therefore 'measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'"); compare *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982) (plurality opinion).

3. Finally, a remedial grant of citizenship would be extraordinary not only because of its importance, but also because of its potential irreversibility. Unlike monetary benefits (see *Westcott*, 443 U.S. at 89-93), which Congress may always prospectively reduce, eliminate, or redistribute in response to a judicial expansion of the entitled class, citizenship, once properly conferred, may not normally be rescinded by legislative action. See *Afroyim* v. *Rusk*, 387

U.S. 253 (1967). Of course, any remedy that limits the ongoing availability of naturalization at birth in order to "equalize" the situation of illegitimate foreign-born children claiming through citizen mothers and those claiming through citizen fathers would have an effect on illegitimate children born abroad to U.S. citizens in the future. It would not, however, take away any benefit of citizenship from persons who have already attained it, compare *Westcott*, 443 U.S. at 90, and Congress could at least correct any hardship, retroactively, if and as it saw fit.[23] Compare *Mathews*, *supra*. Courts should therefore prefer remedial limitation or nullification to expansion of a naturalization statute, at least in the absence of extraordinary circumstances not presented by this case.

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[23] We do not believe that even complete invalidation of Section 309 would either require or permit any change in the status of individuals already recognized as citizens under its terms. The savings and severability provisions of the INA (§§ 405-406, 8 U.S.C. 1101 note) suggest a congressional policy in favor of protecting persons who have already attained citizenship under repealed, amended, or invalidated provisions. Moreover, individuals once recognized as citizens might, at least under the circumstances of this case, be protected from judicial expatriation by analogy to the protection from legislative expatriation afforded all citizens under *Afroyim* v. *Rusk*. See also *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940) ("The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."). The INA's severability clause would also call for the continued application of all valid nationality provisions to persons who become eligible in the future under the statute's terms, but not for the extension of citizenship to new persons on whom Congress has not itself conferred it. Compare *Westcott*, 443 U.S. at 90 (dictum concerning severability provision in context of ongoing receipt of monetary benefits).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. Article I, Section 8, Clause 4, of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

3. Section 301 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 235 (1952), as amended, 8 U.S.C. 1401, provides*:

Nationals and citizens of United States at birth

SEC. 301. The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the

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* The "outlying possessions" of the United States are American Samoa and Swains Island. 8 U.S.C. 1101(a)(29).

granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possession of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of

the United States who, prior to the birth of such person, had resided in the United States.

4. Section 309 of the INA, 66 Stat. 238, as amended, 8 U.S.C. 1409, provides:

Children born out of wedlock

SEC. 309. (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 301(g) shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

5. Before amendment by the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 96-653, § 13, 100 Stat. 3657, and the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, §§ 8(k) and 9(r)(2), 102 Stat. 2617-2618, 2621, Sections 309(a) and (c) of the INA, 8 U.S.C. 1409(a) (1982), read as follows:

Children born out of wedlock

SEC. 309. (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of

such child is established while such child is under the age of twenty-one years by legitimation.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

6. Before their repeal by Section 403(a)(42) of the INA, 66 Stat. 280, Sections 201(g)-(h) and 205 of the Nationality Act of 1940, 54 Stat. 1139-1140, read as follows:

SEC. 201. The following shall be nationals and citizens of the United States at birth:

* * * * *

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the

United States or its outlying possessions for a period or periods of totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

* * * * *

SEC. 205. The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:93CV39

LORELYN PENERO MILLER

v.

SECRETARY OF STATE, WARREN CHRISTOPHER

[Filed: June 2, 1993]

ORDER

Came on for consideration Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint or, in the Alternative, to Transfer Venue, and the Court having considered the motion, and Plaintiffs' response along with the pleadings on file in this case, is of the opinion that the following Order should be entered.

In January 1993, this case was filed by Plaintiff Lorelyn Penero Miller, a resident of Angeles City, in the Republic of the Philippines. Defendant responded by filing a Motion to Dismiss or, in the Alternative, to Transfer Venue, alleging that there was no basis for venue in the Eastern District of Texas. Plaintiff then filed an Amended Complaint, adding Charlie R. Miller as an additional Plaintiff. Mr. Miller is the

natural father of the original Plaintiff. Mr. Miller alleges that his Constitutional right to equal protection under the laws has been violated because, unlike the mother of an illegitimate child, he is not allowed to pass on his citizenship to his daughter. The only relief prayed for in Plaintiffs' Amended Complaint is the removal of impediments to the granting of Ms. Miller's United States citizenship.

Defendant alleges, on the basis of the pleadings now before the Court that Mr. Miller should be dismissed from the lawsuit because he lacks standing requisite for a plaintiff seeking the relief sought in the First Amended Complaint. Mr. Miller concedes that there is no constitutional right to transmit citizenship by descent. *Rogers v. Bellei*, 401 U.S. 815, 830, 91 S.Ct. 1060, 1069 (1971). However, he alleges that the Immigration and Nationality Act of 1952, as amended, violates the rights of fathers of children born out of wedlock outside of the United States to equal protection of the laws. The Supreme Court has reviewed the reasons underlying the distinction between mothers and fathers of children born out of wedlock, and determined that the distinction did not violate the equal protection clause of the United States Constitution. *Fiallo v. Bell*, 430 U.S. 787, 797-799, 97 S.Ct. 1473, 1480-81, 52 L.Ed.2d 50 (1977). Since the Supreme Court has determined the issue contrary to Mr. Miller's position, he cannot rely on it to create venue in this district.

Mr. Miller urges this Court to rely on *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407 (9th Cir. 1993) for the proposition that a dispute involving citizenship is fundamentally different than the dispute in *Fiallo* which concerned preferential treatment of aliens. Assuming, for the sake of the argument that

Wauchope is compatible with Supreme Court precedent and does no violence to [the] rule of stare decisis, it does not establish standing for Mr. Miller in this case. In *Wauchope*, the Ninth Circuit found that the Plaintiffs established standing by asserting their own legal injury as a result of being denied citizenship. The Plaintiffs' parents, whose equal protection rights came into issue, were not parties to the action. Article III of the United States Constitution requires a "case or controversy" between the parties to an action in this Court. Mr. Miller's pleadings assert no cognizable injury, even under the reasoning adopted in *Wauchope*. *Wauchope* simply does not support the Plaintiffs' position that Mr. Miller has standing to be a Plaintiff in this case.

The Court finds that Mr. Miller should be dismissed as a Plaintiff in this case based on his lack of standing. Ms. Miller has asserted no facts that support venue in the Eastern District of Texas without Mr. Miller as a party to the case. The Court therefore finds that the case should be transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1406(a). Venue in that district is appropriate pursuant to 28 U.S.C. § 1391(e)(1), as it is the residence of the Defendant in this action.

It is, therefore, ORDERED that Plaintiff Charlie R. Miller is dismissed as a Plaintiff in this action. It is further ORDERED that the case is transferred to the United States District Court for the District of Columbia.

Signed this 2nd day of June, 1993.

/s/ ROBERT M. PARKER
ROBERT M. PARKER, Chief Judge